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BNSF

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VIA FACSIMILE

Mr. Richard Sisk
U.S. Environmental Protection Agency
999 18th Street
Denver, CO 80202

RE: Libby, Montana/Administrative Order on Consent ("AOC")

Dear Mr. ^{Richard}Sisk:

This is in response to the draft Administrative Order on Consent ("AOC") for Libby, Montana, as it pertains to property owned by The Burlington Northern and Santa Fe Railway Company ("BNSF"). While BNSF intends to move forward in accordance with the work plan we submitted to the Environmental Protection Agency ("EPA"), we do have some comments and continuing concerns relative to the draft order. I have attached only the pages on which the comments appear.

As you know, the material being remediated originated from the mining and processing activity of W. R. Grace at Libby. BNSF's relationship with the material is that of a common carrier, one obligated by federal law to transport the material as commercial product. As such, BNSF has no liability under CERCLA in the conclusions of law cited in the proposed AOC. CERCLA contains a number of provisions that address common carrier liability. Those provisions include: (1) the definitions of "owner or operator" in CERCLA Sections 101(20)(B) and (C), 42 U.S.C. §§ 9601(20)(B) and (C); (2) the definition of "transportation" in CERCLA Section 101(26), 42 U.S.C. §9601(26); (3) a parenthetical in the third-party defense, which excludes from the term "contractual relationship" carriage by a common carrier by rail under a published tariff; and (4) CERCLA Section 306, 42 U.S.C. §9656, which governs transportation of hazardous substances regulated under the Hazardous Materials Transportation Act ("HTMA"). There is no recognition of BNSF's common carrier status in the draft AOC. In fact, BNSF is volunteering to conduct removal activities because of mutual benefits derived with respect to the environment, community and future use of the property.

The asbestos material is of a definable and divisible quantity and location. Whatever harm the material caused is capable of separate and independent response or remedial actions. BNSF has been concerned with the recent proposal to include certain W. R.

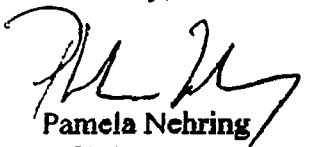
Grace facilities on the National Priorities List ("NPL") and has requested that the Libby railyard not be included. EPA has advised BNSF that the boundaries of the NPL site have not yet been determined. Because of the definable and divisible quantity, location and ability to distinct removal or remediation actions, BNSF does not believe that its property needs be included in the W. R. Grace facility, which has been proposed for the NPL. BNSF would object to such an inclusion.

BNSF also objects to the conclusion of law found in paragraph 13(d), in which EPA concludes that BNSF is jointly and severally liable for the performance of the response actions. BNSF does not believe the facts surrounding this material, its location and its definable quantity support a determination of liability at all, much less joint and several liability. Similarly, BNSF has concerns about the definition of "Site" found in paragraph 7(q), which defines the "Site" as the property and "all suitable areas in very close proximity to the Site". It is not BNSF's intent to address any property other than its own.

BNSF prefers to coordinate and cooperate with EPA to remediate its property. As you know, we had explored whether there are other programs or type of agreements that would better suit our goals. If this is the only type of agreements, it will need to be amended. Therefore, we would request that the above-mentioned issues pertaining to joint and several liability and the definition of "Site" be addressed. In addition, we would like the AOC to reflect that when the work is finished, BSNF has no more responsibilities with respect to the Site or for that matter, the W. R. Grace facilities in Libby.

We sincerely hope to move the work forward in an expeditious manner this fall before weather sets in. Thank you for your cooperation. I would appreciate a call when you have a chance to look at the suggested revisions this morning.

Sincerely,



Pamela Nehring
PN/wlg

Encl.

cc: Dave Smith (with enclosures)

INSERTS

Insert as New Paragraph 13 or at end of Paragraph 11:

[Respondent has raised defenses to the assertions of liability, which are being considered by EPA. The parties acknowledge that there are weather constraints with respect to the timing of the Work to be conducted pursuant to this Order. The parties intend that the Work conducted pursuant to this Order be considered as a credit, in whole or in part, towards a future de minimis or other settlement of Respondent's potential liability.]

Insert at end of Paragraph 12:

The hazardous substances at the Site, nature of activity with respect to such hazardous substances and the amount of harm are geographically and otherwise divisible for and capable of investigation, removal and remedy independent of the facilities owned and operated by W. R. Grace or others at Libby which are the subject of proposed inclusion on the National Priorities List. Respondent objects to the inclusion of the Site on the National Priorities List.

Insert at end of Paragraph 36(a):

not to exceed \$ _____. Under no circumstances shall Respondent be liable to EPA for and EPA shall waive any Future Oversight Costs in excess of \$ _____.

Insert at end of Paragraph XXVII:

The foregoing notwithstanding, nothing in this Order shall require Respondent to take any action, conduct investigation, removal or remediation activities off-Site. In the event that EPA determines that additional removal actions are necessary off-Site, such additional removal actions shall not be the subject of this Order. The parties hereto reserve their respective rights, remedies and defenses in such event, including Respondent's right to de novo administrative or judicial review as provided under applicable law.]

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1. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order on Consent ("Order") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and The Burlington Northern and Santa Fe Railway Company ("Respondent"). This Order provides for the performance of a removal action by Respondent and the reimbursement of certain response costs incurred by the United States or in connection with the Respondent's property comprising the Lobby rail yard in Lobby, Montana (the "Property").

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9612, as amended ("CERCLA").

3. EPA has notified the State of Montana (the "State") of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondent recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Order do not constitute an admission of any liability. Respondent does not admit, and reserves the right to contest in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the findings of fact, conclusions of law, and determinations in Sections IV and V of this Order. Respondent agrees to comply with and be bound by the terms of this Order and further agrees that it will not contest the basis or validity of this Order or its terms.

II. PARTIES BOUND

5. This Order applies to and is binding upon EPA and upon Respondent and its successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Order.

6. Respondent shall ensure that its executives, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondent shall be responsible for any noncompliance with this Order.

III. DEFINITIONS

7. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whichever terms listed below are used in this Order or

to suit any agencies and

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j. "Order" shall mean this Administrative Order on Consent and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Order and any appendix, this Order shall control.

k. "Paragraph" shall mean a portion of this Order identified by an Arabic numeral.

l. "Parties" shall mean EPA and Respondent.

m. "Property" shall mean the The Burlington Northern and Santa Fe Railway Company rail yard located in Libby, Montana and more particularly described in Appendix__

n. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

o. "Respondent" shall mean The Burlington Northern and Santa Fe Railway Company, *its predecessors,*

p. "Section" shall mean a portion of this Order identified by a Roman numeral.

q. "Site" for purposes of this Order shall consist of the Property ~~and all suitable areas in very close proximity to the Site necessary for implementation of the removal action.~~

r. "State" shall mean the State of Montana.

s. "Waste Material" shall mean 1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); 3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and 4) any "hazardous material" under [insert appropriate State statutory citation].

t. "Work" shall mean all activities Respondent is required to perform under this Order, as set forth in the Workplan.

u. "Workplan" shall mean the work plan for implementation of the removal action, as set forth in Appendix __ to this Order, and any modifications made thereto in accordance with this Order.

IV. FINDINGS OF FACT

8. The Site, i.e., the The Burlington Northern and Santa Fe Railway Company rail yard, is located north of the town of Libby, MT and south of the Kootenai River. The Site encompasses approximately 20 acres and is located in Section 7, Township 30 N, Range 31 W of Lincoln

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To a loading facility owned and operated by W.R. Grace, where it was loaded by W.R. Grace employees into rail cars and

County. A total of six railroad tracks trending east-west are present along with associated buildings and siding platforms.

9. Vermiculite mining at Zonolite Mountain (the "mine") was commenced by the Universal Zonolite Company in the 1920s. In 1963, W.R. Grace purchased Zonolite mountain and continued operations until 1990. The processed ore was trucked down the Rainy Creek Road to a Screening Plant, which separated the milled ore into various sizes. Subsequently, the screened ore was moved by conveyor belt across the Kootenai River and shipped either to the W.R. Grace Export/Expansion Plant (Libby) or across the country by rail.

10. Sampling shows that asbestos, a hazardous substance, is present in soil, raw ore, ore-concentrate and other soil-like materials at various locations in and around the community of Libby including the Site. Visible unexpanded vermiculite has been found along Respondent's tracks and rail yards in Libby. *All vermiculite found on Respondent's property originated with W.R. Grace and its predecessors and is present on the Property by virtue of activities of W.R. Grace and its predecessors.*

11. The Acting Assistant Administrator, Office of Solid Waste and Emergency Response has determined that the presence of the asbestos at the Site may present an imminent and substantial endangerment in the Action Memorandum.

12. Respondent owns the The Burlington Northern and Santa Fe Railway Company rail yard, herein referred to as the Property. Respondent recently implemented its own investigations to determine if yard activities would entrain asbestos fibers into the air. *Baseline monitoring along the tracks conducted by Respondent has found the highest concentrations measured during the sweeping ranges from 7 to 14 f/cc in air samples in three locations - Hwy. 37 crossing the railroad tracks, close to the 5th Street, and the loading/unloading station near the Bluffs.* A total of twenty-two surface soil samples collected in November, 2001 by Respondent along the railroad tracks and its railyard ranged from trace to less than 1% fibrous amphibole asbestos by weight. In addition, visible unexpanded vermiculite remained at Track #1, Track #2 and Track #3.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

13. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

a. The Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Site, as identified in the Findings of Fact above, includes a "hazardous substance" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

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d. Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is ~~jointly and severally~~ liable for performance of response actions and for response costs incurred and to be incurred at the Site. ✓

- i. Respondent is the "owner" and/or "operator" of a portion of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).
- ii. Respondent was the "owner" and/or "operator" of a portion of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from a facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The removal action required by this Order is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondent shall comply with all provisions of this Order, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order. *no issues to* ✓

comply with Order.

VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR

14. Respondent shall perform the removal action or retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within 5 days of the Effective Date. Respondent shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least 5 days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondent. If EPA disapproves of a selected contractor, Respondent shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within 10 days of EPA's disapproval.

IX. SITE ACCESS

23. If property where access is needed to implement this Order, is owned or controlled by Respondent, Respondent shall, commencing on the Effective Date, provide EPA, the State, and their authorized representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Order. Any such access will be subject to Respondent's Health and Safety Plan and Respondent's railroad safety rules.

~~24. Where any action under this Order is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use its best efforts to obtain all necessary access agreements within 10 days after the Effective Date, or as otherwise specified in writing by the OSC. Respondent shall immediately notify EPA if after using its best efforts they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondent shall describe in writing its efforts to obtain access. EPA may then assist Respondent in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).~~

25. Notwithstanding any provision of this Order, EPA and the State retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

X. ACCESS TO INFORMATION

26. Respondent shall provide to EPA, upon reasonable request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondent shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

27. Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Respondent

that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondent.

28. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondent assert such a privilege in lieu of providing documents, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

29. No claim of confidentiality shall be made with respect to any data required to be submitted under this Order, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XI. RECORD RETENTION

30. Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that directly relate to the implementation of this Order, regardless of any corporate retention policy to the contrary. Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

31. At the conclusion of this document retention period, Respondent shall notify EPA at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA, Respondent shall deliver any such records or documents to EPA. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent assert such a privilege, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

*documents
required to
be submitted
pursuant to*

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XV. PAYMENT OF RESPONSE COSTS**36. Payments for Future Response Costs.**

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a. Respondent shall pay EPA all Future Response Costs not inconsistent with the NCP. On a periodic basis, EPA will send Respondent a bill requiring payment that includes a SCORPIOS Report. Respondent shall make all payments within 45 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 38 of this Order.

final bill w/in 45 days

b. Respondent shall make all payments required by this Paragraph electronically or by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party(ies) making payment and EPA Site/Spill ID number _____. Respondent shall send the check(s) to:

Mellon Bank
EPA Region VIII
Attn: Superfund Accounting
P.O. Box 360859
Pittsburgh, PA 15251-6859

with full payment

c. At the time of payment, Respondent shall send notice that payment has been made to:
Cost Recovery Program Manager
EPA Region 8
999 18th Street, Suite 300
Denver, CO 80202.

d. The total amount to be paid by Respondent pursuant to Paragraph 36(a) shall be deposited in the Libby Asbestos Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

37. In the event that the payment for Future Response Costs is not made within 45 days of Respondent's receipt of a bill, Respondent shall pay Interest on the unpaid balance. The Interest on Past Response Costs shall begin to accrue on the Effective Date and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

38. Respondent may dispute all or part of a bill for Future Response Costs submitted under this Order, if Respondent alleges that EPA has made an accounting error, or if Respondent alleges that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved

such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

49. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondent in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

XVIII. STIPULATED PENALTIES

50. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 51 and 52 for failure to comply with the requirements of this Order specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by Respondent shall include completion of the activities under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order, and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order.

51. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 51(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500.00	1st through 14th day
\$2000.00	15th through 30th day
\$27,500.00	31st day and beyond

b. Compliance Milestones

Duc- I need you to tell me what milestones are important, such that they should be included in this list. Below are Joyce's initial cut on what was important at Minot.

- Failure to begin the removal action by a date established in the Work plan;
- Failure to provide EPA with air monitoring results within 24 hours of receipt;
- Failure to provide EPA with soil sampling results within 2 weeks of receipt;

} ?

77. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

XXVII. ADDITIONAL REMOVAL ACTION

78. If EPA determines that additional removal actions ^{on the Site} not included in an approved plan are necessary to protect public health, welfare, or the environment, EPA will notify Respondent of that determination. Unless otherwise stated by EPA, within 30 days of receipt of notice from EPA that additional removal actions are necessary to protect public health, welfare, or the environment, Respondent shall submit for approval by EPA a work plan for the additional removal actions. The plan shall conform to the applicable requirements of Section VIII (Work to Be Performed) of this Order. Upon EPA's approval of the plan pursuant to Section VIII, Respondent shall implement the plan for additional removal actions in accordance with the provisions and schedule contained therein. This Section does not alter or diminish the OSC's authority to make oral modifications to any plan or schedule pursuant to Section XXVII (Modifications). ^{INSURE}

XXVIII. NOTICE OF COMPLETION OF WORK

79. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including, post-removal site controls, if necessary, payment of Future Response Costs, or record retention, EPA will provide written notice to Respondent. If EPA determines that any such Work has not been completed in accordance with this Order, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent modify the Work Plan if appropriate in order to correct such deficiencies. Respondent shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified Work Plan shall be a violation of this Order.

XXIX. SEVERABILITY/INTEGRATION/APPENDICES

80. If a court issues an order that invalidates any provision of this Order or finds that Respondent has sufficient cause not to comply with one or more provisions of this Order, Respondent shall remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court's order.

81. This Order and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order. The following appendices are

*no later than 60 days
of such
determination.
Does not
make
sense*

*No
later than 60 days
of such
determination*

pursuant to this Order. Neither Respondent nor any such contractor shall be considered an agent of the United States.

72. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

73. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

XXV. INSURANCE

74. At least 7 days prior to commencing any on-Site work under this Order, Respondent shall secure, and shall maintain for the duration of this Order, comprehensive general liability insurance and automobile insurance with limits of two million dollars, combined single limit. Within the same time period, Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy. In addition, for the duration of the Order, Respondent shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondent in furtherance of this Order. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondent need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

XXVI. MODIFICATIONS

75. The OSC may make modifications to any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties. *And agreed to the parties*

76. If Respondent seeks permission to deviate from any approved work plan or schedule, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph 756.